(3)

No. 05-1472

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID MILLER,

Superintendent, Eastern Correctional Facility,

Petitioner,

v.

JOSE RODRIGUEZ,

Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT

THE LEGAL AID SOCIETY
Criminal Appeals Bureau
Steven Wasserman*
Katheryne M. Martone
199 Water Street - 5th Floor
New York, New York 10038
(212) 577-7993

* *Counsel of record for Respondent Jose Rodriguez*

August 30, 2006

TABLE OF CONTENTS

SUMMARY OF ARGUMENT 1

ARGUMENT 4

As to the First Issue, Review Should Be Denied Because the State did not Argue It in the Court Below 4

The Decision of the Court of Appeals was Correct . . 5

Absent a Showing of Necessity, a Defendant's Sixth Amendment Right to a Public Trial Includes the Attendance of Family Members, Even Where the General Public May Be Excluded 10

As to the Second Issue, Review Should Be Denied Because It Was Not Decided by the Court of Appeals and Is Academic on the Facts of this Case 19

Because any Exclusion of the Family Members was not Justified, There is no Need to Consider and Impose a "Reasonable Alternative" to Closure . . 20

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Ayala v. Speckard, 131 F.3d 62 (2d Cir. 1997) 23

Clingman v. Beaver, 544 U.S. 581 (2005) 2

Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157 (2004) 2, 20

Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983) 18

Gannett v. DePasquale, 443 U.S. 368 (1979) 17

Grimmett v. State, 22 Tex. App. 36, 2 S.W. 631 (Ct. App. 1886) 18

Martin v. Bissonette, 118 F.3d 871 (1st Cir. 1997) 12, 13

In re Oliver, 333 U.S. 257 (1948) ..... *passim*

People v. Hall, 51 App. Div. 57, 64 N.Y.S. 433 (4th Dept. 1900) 11, 19, 22, 24

People v. Jones, 96 N.Y.2d 213, 726 N.Y.S.2d 608 (2001) .. 22, 23

People v. Kerrigan, 73 Cal. 222, 14 P. 849 (1887) 17

People v. Rodriguez, 258 A.D.2d 483, 685 N.Y.S.2d 252 (2d Dept. 1999) 21

People v. Tocco, 258 A.D.2d 374, 685 N.Y.S.2d 699 (1st Dept. 1999) 21

Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984) 24

Reagan v. United States, 202 F. 488 (9th Cir. 1913) 18

Rodriguez v. Miller, 439 F.3d 68 (2d Cir. 2006) ..... *passim*

State v. Beckstead, 88 P.2d 461 (Utah 1939) 11

State v. Schultzen, 522 N.W.2d 833 (Iowa 1994) 21

State v. Suarez, 867 S.W.2d 583 (Mo. Ct. App. 1993) 21

TRW, Inc. v. Andrews, 534 U.S. 19 (2001) 5

United States v. Lucas, 932 F.2d 1210 (8th Cir. 1991) 21

Waller v. Georgia, 467 U.S. 39 (1984) ..... *passim*

STATUTES

28 U.S.C. §2254(d)(1) 5

28 U.S.C. §2254(d)(2) 6

OTHER

Radin, "The Right to a Public Trial," 6 Temple Law Quarterly 381 (April 1932) 16

T. Cooley, Constitutional Limitations, (8th ed. 1927) 17

SUMMARY OF ARGUMENT

The Court of Appeals held quite unremarkably here that the State may not exclude a defendant's family from the testimony of an undercover police officer without a showing that their "exclusion was necessary to protect the State's overriding interest" in the safety and future effectiveness of the officer. Rodriquez v. Miller, 439 F.3d 68, 73-76 (2d Cir. 2006), citing Waller v. Georgia, 467 U.S. 39 (1984); 8a-15a. The State argues in its first issue that family can be excluded upon the same showing necessary to exclude the general public, State's Petition ("Pet.") at 14-23, but that issue, not argued below, is foreclosed by Waller's requirement that no closure be "broader than necessary" to advance the overriding state interest. Waller v. Georgia, 467 U.S. at 48. Thus, the first issue the State presents has already been resolved.

Accordingly, none of this Court's usual considerations for granting a writ of certiorari apply in this case, see Supreme Court Rule 10, and the State does not cite to any of them, see Pet. at 13-25, nor could it, since the decision of the Court of Appeals is not in conflict with a decision of this Court, the other Circuits, or any State Supreme Court in the United States.

Certiorari should also be denied because, as the State

acknowledges, it did not previously argue in the courts below the first question presented, "that if the general public properly could be excluded from the courtroom, it necessarily followed that the defendant's family could be excluded as well." Pet. at 20. The State's failure to do so strongly militates against this Court's review of a question the Court of Appeals was never given an opportunity to decide. See, e.g., Clingman v. Beaver, 544 U.S. 581, 597-598 (2005) (Supreme Court "ordinarily do[es] not consider claims neither raised nor decided below").

For similar reasons, this Court should decline to review the State's second question presented, "[W]hat measures may constitute reasonable alternatives to closure of the courtroom." Pet. at 23. As the State also acknowledges, Pet. at 24, the Court of Appeals did not reach this question. See e.g., Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157, 168-169 (2004) ("[w]e ordinarily do not decide in the first instance issues not decided below") (citation and quotation marks omitted). In light of the Court of Appeals' holding that "any type of closure excluding Rodriguez's family was improper here," the court did not "address 'alternatives to closure' under Waller's third prong." Rodriguez v. Miller, 439 F.3d at 76; 15a. Contrary to the State's view, there is no occasion for a court to consider an "alternative" to

closure if closure is not justified under Waller's test.

The bulk of the State's argument rests upon simple disagreement with the Court of Appeals' resolution of the merits of Mr. Rodriguez's claim based upon its application of the firmly-rooted principles of constitutional law set forth in Waller v. Georgia, 467 U.S. at 39, and In re Oliver, 333 U.S. 257 (1948), and the extensive, ancient authorities upon which those decisions rely. Rodriquez v. Miller, 439 F.3d at 73-76; 8a-15a. At bottom, the State's quarrel is with the Sixth Amendment, not the Court of Appeals.

Waller and In re Oliver leave no room for doubt that the very core of the Sixth Amendment public trial right is its protection of a defendant's interest in the presence of family and friends. As the State agrees, Waller sets forth a rule of general applicability. Pet. at 22. It prescribes a mandatory procedure for determining applications to close the courtroom that is realistic about exigencies that can arise and allows for the "rare" closing of proceedings. The Waller test does take care to avoid needlessly impinging upon the fundamental right to an open and public trial. Its stated requirement that any closure be tailored to the necessity at hand has been universally read to require the attendance of family members unless they pose an actual threat. See Waller v. Georgia, 467 U.S. at 48. Thus, Waller and its antecedents

provide all the guidance trial courts need in properly weighing the competing interests at stake, with the presumption in favor of an open proceeding attended, "at the very least," by a defendant's "friends, relatives and counsel." In re Oliver, 333 U.S. at 271-272.

In the end, the State's questions do not stem from any confusion in the law, but arise from a deep hostility to defendants' paramount right to the presence of loved ones at trial. Despite the State's view, American law is settled on this point, and this Court's scarce resources need not be expended to revisit it.

ARGUMENT

As to the First Issue, Review Should be Denied Because the State did not Argue it in the Court Below

The State acknowledges that, "[i]n the courts below . . . the State did not argue that if the general public properly could be excluded from the courtroom, it necessarily followed that the defendant's family properly could be excluded as well, without the State having to show any additional facts particular to the defendant's relatives." Pet. at 20. The State seeks to excuse its failure to do so on the ground that "[p]rior case law in the Second Circuit precluded the State from taking that position." Pet. at 20 n.2. Yet, the existence of authority against the State's position did not relieve the State of its obligation to make its argument and

give the Court of Appeals a chance to consider it. Accordingly, review should be denied. See, e.g., TRW, Inc. v. Andrews, 534 U.S. 19, 34 (2001) ("[w]e do not reach this issue because it was not raised or briefed below").

The Decision of the Court of Appeals was Correct

Under the clear rules of constitutional law set forth in Waller v. Georgia, supra, the trial court here was without authority, under the Sixth Amendment, to limit the family members' attendance at trial, absent a showing that their presence was "likely to . . . prejudice[]" "an overriding interest." 467 U.S. at 48. On neither the original nor the expanded record has the State ever demonstrated that the attendance of Mr. Rodriguez's mother or brother at his trial was "likely" to harm the undercover officer's safety or effectiveness. Id. For this fundamental reason, Mr. Rodriguez was denied a public trial by the wholly unjustified exclusion of his family from the key part of the prosecution's case. A writ of habeas corpus was correctly granted. See 28 U.S.C. §2254(d)(1).

The decision here involves a straightforward and correct application of Waller and In re Oliver that the Court need not review. The following evidence was adduced during the hearing before the trial court:

> On cross-examination, the Undercover admitted that Rodriguez had never threatened him and he had never

> seen Rodriguez, or any of his associates, in possession of a gun. Additionally, the Undercover conceded that he did not know any of Rodriguez's relatives, and had no reason to believe that Rodriguez's mother was involved in drug dealing. Finally, the Undercover stated that he had never been directly threatened, but, instead, had only learned of potential threats via conversations with informants.

Rodriguez v. Miller, 439 F.3d 68, 70-71 (2d Cir. 2006); 4a.

Although the State was given an opportunity to adduce additional evidence after remand to the District Court, it failed to establish, even then, that either of Mr. Rodriguez's family members presented a risk to the undercover police officer's safety or effectiveness. The only additional evidence the State adduced regarding Mr. Rodriguez's mother and brother was their addresses at the time of trial.[1]

---

[1]In light of its holding granting Mr. Rodriguez relief, the Court of Appeals did not reach Mr. Rodriguez's argument that the District Court erred by expanding the record on remand to include information regarding his family members' addresses. Rodriguez v. Miller, 439 F.3d at 76 n.3; 15a. This record difficulty is an additional reason why review should be denied.

As Mr. Rodriguez argued below, the District Court's decision to expand the record was an abuse of its discretion under the habeas corpus rules and related caselaw and violated the statute's directive that the reasonableness of a state court's factual determination is to be assessed "in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d)(2).

In this regard, there is no basis whatsoever for the State's present contention that "it was assumed in the trial court, . . ., that the defendant's relatives indeed lived within or in close proximity to, the neighborhood of the

(continued...)

In correctly determining that the state courts unreasonably applied Waller in effectively excluding Mr. Rodriguez's family from the courtroom, the Court of Appeals noted:

> [T]he trial court made no findings with respect to the mother or brother. Furthermore the Undercover had never encountered nor did he even know anyone in Rodriguez's family. And there was no indication that either Rodriguez's mother or brother was dangerous, knew of his criminal activity, or was familiar with any of his associates.

Rodriguez v. Miller, 439 F.3d at 74 (emphasis in original); 11a-12a.

The State disagrees with the Court of Appeals' conclusion that the mere fact that Mr. Rodriguez's mother and brother lived in some "proximity" to the charged transactions was, by itself, "not enough to establish a threat to the Undercover's safety or efficacy." Rodriguez v. Miller, 439 F.3d at 75; 12a. While the State repeatedly asserts that Mr. Rodriguez's mother and brother lived in the "neighborhood" of the officer's continuing activities, see Pet. 20-22, the likelihood of an encounter was actually much smaller than that

---

[1](...continued)
undercover officer's continuing operations." Pet. at 21. Evidence regarding the addresses was not presented to the trial court, and, as the Court of Appeals found, "the trial court made no such finding." Rodriguez v. Miller, 439 F.3d at 75; 12a.

term suggests. The officer testified that he was returning to Bushwick, Brooklyn. Rodriquez v. Miller, 439 F.3d at 70; 3a. By no stretch does "neighborhood" fairly describe Bushwick, a large and densely-populated urban area of more than one hundred thousand residents.

The State complains, without citation to authority, that Waller does not require a showing that "the defendant's relatives more likely than not will compromise the officer's safety or effectiveness." Pet. at 21.[2] The State does not explain why. Waller's plain language requires a demonstration that the open courtroom is "likely" to prejudice an "overriding interest." Waller v. Georgia, 467 U.S. 39, 48 (1984).

The Court of Appeals did not, as the State contends, "in effect substitute[ ] its own independent authority for that of the state courts." Pet. at 22. Rather, the court determined that, in relieving the State of any burden of demonstrating that the family members presented a risk, the state courts unreasonably applied this Court's precedent. Rodriquez v. Miller, 439 F.3d at 76; 15a. In carefully considering and rejecting each of the State's arguments, the Court of Appeals

---

[2]The State's attempt to lessen the required showing, to something less than "more likely than not" Pet. at 21, constitutes a telling concession regarding the weakness of its showing.

concluded that the alleged risk to the undercover officer's safety and effectiveness rested, not on an actual showing, but "conclusory statements," "conjecture," and a "naked assertion" of fear. Rodriquez v. Miller, 439 F.3d at 74-75; 11a-12a, 14a.

With no proof of a real risk in this case, the State argues that no such showing is necessary, on the view that it can bootstrap upon the factual showing that justified exclusion of the general public to exclude Mr. Rodriguez's family. See Pet. at 13-25. In support of this notion, the State posits that family members' familial relationship, standing alone, creates a presumption of dangerousness. See Pet. at 18-19. Yet, the State offers no empirical support for this anti-family claim and can point to no place in Sixth Amendment caselaw where it was ever accepted.

The Court of Appeals was correct to conclude that prejudice against the attendance at trial of family members is inconsistent with the Sixth Amendment. The State identifies no conflicting decision by this Court, another United States Court of Appeals, or highest State Court. See Supreme Court Rule 10(a) & (c). Accordingly, review should be denied.

Absent a Showing of Necessity, a Defendant's Sixth Amendment Right to a Public Trial Includes the Attendance of Family Members, Even Where the General Public May Be Excluded

The State claims that this Court has never recognized that family members should be treated differently than the general public in determining who, out of necessity, may be excluded from a defendant's trial, and that a "controversy" surrounding this issue "derives from dicta in this Court's decision in In re Oliver, 333 U.S. 257 (1948)." Pet. at 16. In fact, this Court's discussion in In re Oliver amounts to nothing more or less than a recapitulation of the historical underpinnings of the Sixth Amendment.

As this Court explained, "This nation's accepted practice guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before settlement of our land as an accompaniment of the ancient institution of jury trial." In re Oliver, 333 U.S. at 266. This Court observed: "In giving context to the constitutional and statutory commands that an accused be given a public trial, the state and federal courts have differed over what groups of spectators, if any, could properly be excluded from a criminal trial." In re Oliver, 333 U.S. at 271. Nonetheless, "without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel

present, no matter with what offense he may be charged." Id. In its review of relevant authorities, this Court found that "there has never been any intimation that all of the public, including the accused's relatives, friends, and counsel, were barred from the trial chamber." In re Oliver, 333 U.S. at 272 (collecting authorities).

Despite the State's efforts to cast In re Oliver as the source of confusion on the subject, see Pet. at 16-18, this Court's discussion and citation to authorities make clear that the defendant's interest in the attendance of his family and friends is at the core of the Sixth Amendment right. See In re Oliver, 333 U.S. at 272 n. 29, citing with approval State v. Beckstead, 88 P.2d 461, 462 (Utah 1939) (the "order excluding all spectators including friends and relatives" was "fundamental" error), and People v. Hall, 51 App. Div. 57, 64 N.Y.S. 433 (4th Dept. 1900) (right to public trial correctly applied where the trial court excluded the general public but "was insistent in stating that any friends of the defendant would be admitted"). At the time of In re Oliver, there had "never been any intimation" that the type of closure the State now seeks to routinize - the barring from the courtroom of all the public "including the accused's relatives, [and] friends" - would be tolerated. In re Oliver, 333 U.S. at 272.

As the State acknowledges, "some" courts have "understood

properly excluded from the courtroom, the defendant nonetheless, as a general rule, has the right to have his family attend the trial." Pet. at 17 (citing authorities). Those courts, including the New York Court of Appeals, are correct. Given its derivation, Waller's four-part test clearly incorporates and applies this Sixth Amendment principle to the various situations trial courts face. See Waller v. Georgia, 467 U.S. at 48.

The State cites a single case, Martin v. Bissonette, 118 F.3d 871 (1st Cir. 1997), as evidence of conflicting decisions regarding the attendance of defendants' family members at trial. Pet. at 17-18. The State's reliance on Martin is misplaced. While Martin rejected the defendant's argument that In re Oliver required application of a "heightened" standard "whenever a court excluded a family member from a criminal defendant's trial," even where he or she poses a threat, see Martin v. Bissonette, 118 F.3d at 875-876, the State reads too much into the court's language, see Pet. at 17-18.

By rejecting a "heightened" standard for family, Martin did not, as the State suggests, jettison the requirements that the State establish that the family presents an actual risk and that the closure be no broader than necessary to protect

the State's interest. See Pet. 17-18. The court explained:

> Nothing in Oliver . . . suggests that a trial court need go beyond the already stringent requirements of Waller before removing a defendant's family from the courtroom. Those requirements - including the existence of an overriding interest that is likely to be prejudiced in the absence of closure and that the closure must be no more expansive than necessary to protect that interest - adequately safeguard a defendant's interest in permitting his family to be present in the courtroom.

Martin v. Bissonette, 118 F.3d at 876. Applying the Waller test, the court determined that, where the defendant, his brother, his girlfriend, and an unidentified woman had intimidated the witness, the State had justified exclusion of the family "to end this widespread reign of harassment and secure the witness' accurate testimony." Martin v. Bissonette, 118 F.3d at 875.

Here, unlike in Martin, the State did not demonstrate any necessity for the family's exclusion. Instead, the State asks to be excused of its burden and invites "this Court to hold, consistent with the teachings of Waller and Oliver, that whenever, in order to protect the safety and effectiveness of an undercover police officer, closure of the courtroom to the general public is warranted, then closure of the courtroom to the defendant's relatives is also warranted." Pet. at 18. As explained above, such an automatic-closure rule for family

members is repugnant to In re Oliver and the venerable authorities upon which it relies. See In re Oliver, 333 U.S. at 266-273 (and authorities cited therein).

Likewise, the State's proposal to treat family members and strangers the same under the Sixth Amendment cannot be reconciled with the strict test this Court promulgated in Waller, which heavily cites and quotes from Oliver. See Waller v. Georgia, 467 U.S. at 45-48. The State's argument that Waller permits a rule of indifference to family members, see Pet. at 13-25, ignores Waller's presumption of openness, the care it requires trial courts to take in narrowly ordering closure only when necessary, and its stated requirement that the closure order be no broader than necessary and supported by adequate findings. See Waller v. Georgia, 467 U.S. at 45-48. Incorporating the principles set forth in In re Oliver, Waller's requirements protect the defendant's right to a public trial attended "at the very least" by a defendant's "friends, relatives, and counsel." In re Oliver, 333 U.S. at 271-272.

To the extent that the State is requesting some sort of exception to Waller for cases involving undercover police officer testimony, see Pet. at 18-23, its proposed exception is so vast that it swallows the rule. According to the State, the "rationale for closing the courtroom to the general public

applies with equal force, if not greater force to the defendant's family." Pet. at 18. The State's conclusion is based, not upon any shred of empirical evidence, but upon the speculation that the family members "may well harbor anger toward the officer" and therefore "are among the persons most likely to point him out to other parties with an interest in harming him or interfering with his undercover police work." Pet. at 19 (emphasis in original).

The Sixth Amendment right to a public trial applies to all criminal cases. And, this Court recognized a defendant's right to the presence of his family "no matter with what offense he may be charged." In re Oliver, 333 U.S. at 272. It is possible to speculate, in every case, no matter the charge, or where the relatives happen to live, that the family may be hostile to the prosecution's witnesses. On the State's expansive theory, family members always pose a theoretical risk to the State's interest, and they may be excluded from the courtroom based on their relationship to the defendant alone.

The State maintains that its sweeping generalization is permissible because:

> [t]he prosecution generally knows nothing about the background, character, or day-to-day activities of the various relatives of the defendant who may seek to attend the trial during the undercover officer's testimony . . .

Pet. at 21-22. The State's complaint about the rarity of the case in which a defendant's relatives may be properly excluded is no reason to lessen the constitutionally-required showing. This Court "has made clear that the right to an open trial may give way in certain cases to other rights or interests," but "such circumstances will be rare." Waller v. Georgia, 467 U.S. at 45.

The State utterly fails to perceive what is so special about the presence of family:

> [T]here is nothing about the presence in the courtroom of a defendant's family qua family that particularly serves to advance any of [the Sixth Amendment's] goals. Therefore, if the circumstances of a case justify closing the courtroom to the general public, then there is nothing in the Public Trial clause that suggests that the defendant nevertheless has a right to his family's presence in the courtroom.

Pet. at 19-20.

For enlightenment, the State need look no further than this Court's precedent. In In re Oliver, this Court observed:

> Even those who deplore the sensationalism of criminal trials and advocate the exclusion of the general public from the courtroom would preserve the rights of the accused by requiring the admission of the press, friends of the accused, and selected members of the community.

In re Oliver, 333 U.S. at 272 n. 29, citing, inter alia, Radin, "The Right to a Public Trial," 6 Temple Law Quarterly

381, 394-395 (April 1932).

In both Waller and In re Oliver, this Court quoted Justice Cooley's treatise, which emphasizes the benefit of attendance by "interested spectators":

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and the importance of their functions . . .

See Waller v. Georgia, 467 U.S. at 46, quoting Gannett v. DePasquale, 443 U.S. 368, 380 (1979) (quoting In re Oliver, 333 U.S. at 270 n. 25, in turn quoting T. Cooley, Constitutional Limitations, p. 647 (8th ed. 1927)).

Cooley's treatise, in turn, marshals the relevant authorities, which consider whether the defendants received a public trial in light of the attendance of their lawyers, families, and other spectators "interested" in the case. As these cases demonstrate, trial courts historically allowed "interested" individuals, such as family members, to remain, even when the general public was excluded out of concern for sensitive witnesses, to maintain order in the courtroom, or to protect public morals. See Cooley, Constitutional Limitations, at 647 n.7 (8th ed. 1927), citing, inter alia, People v. Kerrigan, 73 Cal. 222, 14 P. 849 (1887) (the defendant's right to a public trial was not violated by a

closure order which "allowed to remain" "officers of the court, reporters of the public press, friends of the defendant, and persons necessary for her to have on said trial"); Grimmett v. State, 22 Tex. App. 36, 2 S.W. 631 (Ct. App. 1886) (closure order did not exclude "any person who could have been of any service to the defendant in his trial").

Likewise, the federal authorities upon which this Court also relied in Waller and In re Oliver consider whether, at the very least, the defendant's friends, relatives, or other individuals with an interest in the case were admitted. See Waller v. Georgia, 467 U.S. at 46, citing Douglas v. Wainwright, 714 F.2d 1532, 1537 (11th Cir. 1983) (upholding trial court's order which permitted members of the defendant's family to remain); In re Oliver, 333 U.S. at 271 n. 27, citing Reagan v. United States, 202 F. 488, 490 (9th Cir. 1913) (the defendant was not "deprived of the presence, aid, or counsel of any person whose presence might of been of advantage to him").

In People v. Hall, supra, also cited by this Court in In re Oliver, 333 U.S. at 272 n. 29, the court graphically illustrated the difference, which the State does not believe exists, between a trial attended by members of the general public and one at which a defendant's relatives and friends

are present:

> In a time of political or local excitement, if the trial judge permitted the court room to be packed exclusively with men opposed to the defendant on trial, the trial would not be public in fairness to the defendant. Every seat and all the standing room might be occupied, but the character of the spectators present, and the friendliness to the accused of those who failed to gain admittance, perhaps through the connivance of the court are to be considered in deciding whether the rights of the defendant have been trampled upon.

People v. Hall, 51 App. Div. at 57, 64 N.Y.S. at 436-437.

For these reasons, the State's proposed questions stem from a fundamental misapprehension of the nature of the right to a public trial. The petition for a writ of certiorari should be denied.

As to the Second Issue, Review Should be Denied Because It was Not Decided by the Court of Appeals and Is Academic on the Facts of this Case

The State asks this Court to decide "what measures may constitute reasonable alternatives to closure of the courtroom" and argues that it is an open question whether a trial court may entirely circumvent Waller and infringe on a defendant's Sixth Amendment right, so long as its order diminishing or disparaging the right to family members' attendance is something short of ordering their absolute exclusion under all circumstances. Pet. at 23-25.

As noted above, the Court of Appeals did not reach the

issue of alternatives to closure, observing that a "screen was never actually used" in this case, "thus making this a less than ideal posture in which to decide where a screen falls on the spectrum of closures." Rodriguez v. Miller, 439 F.3d at 76; 15a. The court further noted that its "ruling that any type of closure excluding Rodriguez's family was improper" made it unnecessary to address "alternatives to closure." Id.; 15a. Accordingly, because the court correctly declined to address the issue of alternatives to closure, which is purely hypothetical on the facts of this case, review should also be denied as to the State's second question presented. See Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. at 168-169 (declining to reach issue which was not decided below).

Because any Exclusion of the Family Members was not Justified, There is No Need to Consider and Impose a "Reasonable Alternative" to Closure

Under Waller, to overcome the Sixth Amendment's strong presumption of a public proceeding, the State must advance an interest justifying the exclusion sought and show that this interest is "likely to be prejudiced" by the family's attendance. Waller v. Georgia, 467 U.S. at 48. In this case, the State advanced no interest requiring the exclusion of Mr. Rodriguez's family. The State court excused the failure to comply with Waller's requirement, on the view that the trial

court offered an "alternative to closure with regard to [Mr. Rodriguez's] family . . . ." People v. Rodriquez, 258 A.D.2d 483, 685 N.Y.S.2d 252 (2d Dept. 1999). Yet, this Court has recognized no such exception to Waller. As the Court of Appeals correctly determined, the state court's decision constituted an unreasonable application of this Court's authority. Rodriquez v. Miller, 439 F.3d at 73-76; 8a-15a.

The State's theorizing that a trial court may avoid Waller's requirements and still restrict the attendance of family members is unsupported by any authority whatsoever. See Pet. at 24-25. With a single exception, none of the cases the State cites actually hold that the four prongs of Waller are inapplicable, as the State urges here, where an "alternative" to closure is imposed. See United States v. Lucas, 932 F.2d 1210, 1217 (8th Cir. 1991) (government established "overriding interests"); State v. Schultzen, 522 N.W.2d 833, 836 (Iowa 1994) (same); State v. Suarez, 867 S.W.2d 583, 587 (Mo. Ct. App. 1993) ("need for safety of the officer and security for the ongoing undercover investigation" were both "legitimate reasons for the trial court's action in screening the witness"). The exception, People v. Tocco, 258 A.D.2d 374, 685 N.Y.S.2d 699 (1st Dept. 1999), is an intermediate New York State appellate court decision that is in conflict with the later decision of that State's highest

court, and which is contemporaneous to the vacated decision here. In People v. Jones, 96 N.Y.2d 213, 219-220, 726 N.Y.S.2d 608, 613 (2001), the New York Court of Appeals held correctly that, in choosing an "alternative to closure," a trial court does not, and cannot, circumvent Waller: "When the procedure requested impacts on a defendant's right to a public trial, nothing less than an overriding interest can satisfy constitutional scrutiny." Id.

Without Waller's requirements to fetter a trial court, the State's proposed rules would permit courts to routinely restrict a defendant's right to his family's attendance when the "State has presented testimony at a closure hearing sufficient to justify closure of the courtroom to the general public." Pet. at 24-25. In stark contrast, under the governing caselaw, a trial court's authority to restrict a defendant's public trial rests on the "necessity" for a closed one. Waller v. Georgia, 467 U.S. at 45 (requiring findings that "closure is essential"). Nonetheless, on the State's view, in every case where the general public is properly excluded, the trial court may deny the defendant his right to his family's presence by ordering a screen, the inherent prejudice of which can only be avoided by their leaving the courtroom. See People v. Hall, 51 App. Div. at 57, 64 N.Y.S. at 435 (the court "cannot gain by indirection what it lacks

BEST AVAILABLE COPY

the authority to do directly"); see also Ayala v. Speckard, 131 F.3d 62, 71-72 (2d Cir. 1997) (trial courts should not sua sponte consider alternatives to closure such as the use of a screen because this measure "risks implying to the jury that the family or friends of the defendant in attendance are likely to be dangerous" and "pose[s] substantial risks to a fair trial for the defendant").

The State's approach also ignores the fact that the term "alternative to closure" has a specific meaning in the caselaw. Under Waller, an "alternative to closure" may be considered only where the State has shown that closure is, in the first instance, justified. See Waller v. Georgia, 467 U.S. at 48 (the "trial court must consider reasonable alternatives to closing the proceeding"); People v. Jones, 96 N.Y.2d at 219-220, 726 N.Y.S.2d at 613 ("overriding interest" required to justify "limited and conditional restriction on access to the courtroom"). This step in the Waller procedure ensures that, even where closure is fully justified, the attendance of a defendant's family is secured to the greatest extent possible.[3]

---

[3]As the jurisprudential antecedents of Waller make clear, the requirement of a court considering less restrictive alternatives to the complete closure of a public proceeding before ordering closure derives from the general constitutional principle that fundamental rights, i.e. public access under the First Amendment or a public trial under the (continued...)

By unmooring the term from its legal context, the State seeks to achieve the opposite result: A defendant's family may be effectively excluded from the courtroom for no particular, real reason at all; and such exclusion need not be "essential" to protect an "overriding interest" from suffering "likely prejudice," as the controlling constitutional law requires. See Waller v. Georgia, 467 U.S. at 45-46, citing Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 510 (1984), and citing In re Oliver, 333 U.S. at 270, citing, e.g., People v. Hall, 51 App. Div. at 57, 64 N.Y.S. at 433. Far from being an open question, such gratuitous infringements upon the fundamental right to a public trial are categorically foreclosed under the Sixth Amendment.

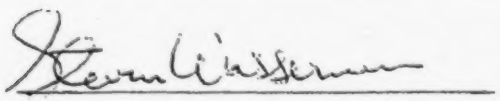
---

[3](...continued)
Sixth Amendment, should only be abridged to the extent necessary. Hence, the requirement of considering a "least restrictive alternative" or "reasonable alternative" to closure before closure is ordered. As Justice Marshall explained in Press-Enterprise, supra, "prior to issuing a closure order, a trial court should be obliged to show that the order in question constitutes the least restrictive means available for protecting compelling state interests." 464 U.S. at 520. (concurring opinion) (emphasis in original). Such an analysis is wholly inapplicable where, as here, exclusion of the family is not justified in the first instance.

CONCLUSION

FOR THE ABOVE REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,



Steven Wasserman*
Katheryne M. Martone
Counsel for Respondent

THE LEGAL AID SOCIETY
Criminal Appeals Bureau
199 Water Street - 5th Floor
New York, New York 10038
(212)577-7993

*Counsel of Record

August 30, 2006